

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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21-CR-80 (AMD)

UNITED STATES OF AMERICA,

Plaintiff,

United States Courthouse
Brooklyn, New York

-against-

March 28, 2023
9:30 a.m.

DOUGLASS MACKEY,

Defendant.

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TRANSCRIPT OF CRIMINAL CAUSE FOR TRIAL
JURY PRESENT
BEFORE THE HONORABLE ANN M. DONNELLY
UNITED STATES DISTRICT JUDGE
BEFORE A JURY

APPEARANCES

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Proceedings recorded by mechanical stenography. Transcript
produced by computer-aided transcription.

1 (In open court; Jury not present.)

2 THE COURT: All right. I think Ms. Greene showed
3 the parties the note that we received from the jury which was
4 dated today at 11:40 a.m. and it reads: Dear Judge Donnelly,
5 may we request the transcript of the proceedings? That would
6 include the testimony, lawyers questions, et cetera. Thank
7 you, jury foreman. And it's signed by Juror Number 1.

8 From yesterday, I think we had already taken all the
9 sidebar conferences out, so I guess they just want the entire
10 trial.

11 MR. PAULSEN: Yes, Your Honor. There was one
12 modification that we wanted to flag for you.

13 THE COURT: Okay.

14 MR. PAULSEN: One of Mr. Frisch's letters from
15 Monday morning was that there was a date that was incorrect.

16 Can we just make a hand modification with the
17 consent of the Court?

18 THE COURT: It's all right with me. I'm just
19 thinking if I were a juror and I saw that, what would I think?

20 MR. PAULSEN: It says 25th when it should say 5, and
21 so it's really removing just one digit.

22 THE COURT: All right. Do you have any problem with
23 that?

24 MR. FRISCH: No.

25 THE COURT: All right. Doesn't sound like it's the

1 key to the case.

2 MR. PAULSEN: It shouldn't be, and I think the
3 correct date was said repeatedly. I think it was an error in
4 the transcription.

5 THE COURT: All right. So what we are we'll do is
6 we'll send those transcripts back with that modification.

7 Is that the transcript right there in the binder?

8 MR. PAULSEN: It is, Your Honor. And Ms. Parshad
9 has some whiteout, so she can just white-out the one letter.

10 THE COURT: What would you guys do without
11 Ms. Parshad?

12 MR. PAULSEN: She's extraordinary.

13 THE COURT: She deserves a raise.

14 All right. So the jury note is Court Exhibit
15 Number 3.

16 (Court Exhibit 3, was received in evidence.)

17 THE COURT: Anything else that anybody wants to put
18 on the record?

19 MR. FRISCH: Just what time we could be free to
20 leave the building or do you want us to wait around and decide
21 that later? Not that I'm rushing to leave.

22 THE COURT: No, you're not transfixed by the
23 proceedings that are going on in other courtrooms?

24 I mean, if you go close by, we'll just call you as
25 long as we have your cell phone. Yeah. So --

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1 MR. FRISCH: Maybe I'll wait until like 12:00 or
2 12:15, something like that.

3 THE COURT: Yeah, just as long as it's easy for you
4 to get back. Okay. All right.

5 Thanks, everybody.

6 (A recess was taken at 11:54 a.m.)

7 (Time noted: 12:06 p.m.)

8 THE COURTROOM DEPUTY: All rise.

9 THE COURT: Hi. Everybody can sit down.
10 What's the trouble?

11 MR. BUFORD: So Your Honor, we just wanted to
12 clarify. We jointly, I think, understand the note to be
13 asking for the transcript of the proceeding to exclude
14 openings statements and closing arguments, and therefore we're
15 not going to send back those as part of the transcript.

16 THE COURT: Well, I wouldn't do it any way.

17 MR. BUFORD: Understood.

18 THE COURT: Just the testimony.

19 MR. FRISCH: First of all, it's not the joint
20 understanding. I've actually had this issue come up in
21 another case.

22 And here's my position on it: They have asked for
23 all proceedings by the -- as I remember the note -- by the
24 language of their note, they're asking for the jury addresses.
25 I think there's a couple of different options, one of which is

1 to call them in or ask them if they want jury addresses --

2 THE COURT: Well, I don't think it's proper to send
3 jury summations and opening statements back.

4 And I -- do you want me to do that? Is that what
5 you're asking?

6 MR. FRISCH: Well, I think that -- it's two answers.
7 Number one, I think it's not clear from their note when they
8 say proceedings, if that's what they want. I can't remember
9 if it says entire proceedings --

10 THE COURT: The transcript of the proceedings that
11 would include the testimony, lawyers' questions, et cetera.

12 MR. FRISCH: First answer, it's not clear to me what
13 they want. I think they have to be asked. Second, my
14 recollection of the law, and it's been a number of years since
15 I did this trial where this came up, it's just a matter of the
16 Court's discretion. But I think the first question is whether
17 that's what they want.

18 MR. BUFORD: Your Honor, I think the Court
19 instructed them that the statements by the attorneys are not
20 evidence. I would suggest that what they're asking for is the
21 evidence, and if they want the addresses, they know how to
22 ask for it.

23 THE COURT: I think that's right. First of all, it
24 is not my practice, even when they request it, to send those
25 back, because they're not evidence. And so I think we'll just

1 send back the transcript as-is. They don't specifically
2 mention the openings and closings, but I think because of the
3 fact that they're not evidence, I'm not going to send it back.
4 All right.

5 Anything else? Oh, the court reporter fixed the
6 date.

7 MR. BUFORD: I'm sorry, Your Honor. It's printed
8 double-sided, so we need a double-sided replacement of the
9 page.

10 THE COURT: I don't think you need me for this part.

11 (A recess was taken at 12:10 p.m.)

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13 (Continued on the following page.)

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1 A F T E R N O O N S E S S I O N

2 (Time noted: 4:35 p.m.)

3 (In open court; Jury not present.)

4 THE COURTROOM DEPUTY: All rise.

5 THE COURT: All right. Everybody can have a seat.

6 All right. Oh, your client?

7 MR. FRISCH: Mr. Mackey is headed up. I'll rush him
8 along.

9 THE COURT: You don't have to rush him.

10 (Defendant enters the courtroom.)

11 (Time noted: 4:39 p.m.)

12 THE COURT: All right. Ms. Greene I think passed
13 out copies of the jury's most recent note from about 4:15 and
14 it reads: Dear Judge Donnelly, we have completed our
15 deliberations and we have not, underlined, reached a unanimous
16 decision. Please advise. And it's signed -- it says thank
17 you, and it's signed by the foreperson. And that will be
18 Court Exhibit 4.

19 (Court Exhibit 4, was received in evidence.)

20 THE COURT: I'll surely hear from the parties, but I
21 propose to do the following: It's about 20 minutes to 5:00,
22 and what I proposed to do is give them kind of a mild modified
23 Allen charge, and have them stop deliberating for the night,
24 come back tomorrow. I just don't think they've been
25 deliberating long enough to give them a full Allen charge.

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1 But I'll hear anybody's position on that.

2 MR. PAULSEN: Your Honor, that sounds fine to us. I
3 think we also thought this has not been quite long enough for
4 an Allen charge.

5 MR. FRISCH: Your Honor's proposed approach sounds
6 right.

7 THE COURT: Okay. So let me just tell you what I'm
8 going to say to them so it's not a surprise. I'm just going
9 to tell them that we got the note and that I'm just going to
10 tell them that they've only been deliberating for a relatively
11 short period of time. It is very often the case that jurors
12 feel they can't reach a decision, but after they continue to
13 deliberate, they determine that that they can. So then I'll
14 remind them not to change their opinions if they are convinced
15 that they -- don't hesitate to change your opinion if you're
16 convinced you were wrong, but don't surrender an honestly-held
17 view of the case. Then I'm going to tell them I'm not trying
18 to rush them or pressure them, and to tell them to take as
19 much time as they need, but given the hour, I think the best
20 thing to do is to stop for the night and resume fresh in the
21 morning. All right.

22 MR. PAULSEN: That's fine, Your Honor.

23 MR. FRISCH: Yes.

24 THE COURT: Okay.

25 (Pause in the proceedings.)

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1 (Time noted: 4:43 p.m.)

2 THE COURTROOM DEPUTY: All rise.

3 (Jury enters the courtroom.)

4 THE COURTROOM DEPUTY: You may be seated. Sorry.

5 THE COURT: All right. Ladies and gentlemen, I have
6 received your note. And it reads: Dear Judge Donnelly, we
7 have completed our deliberations and we have not reached a
8 unanimous decision. Please advise. Thank you. And it's
9 signed by our foreperson.

10 I realize, you know, from your note that you're
11 having difficulty reaching a unanimous agreement. That is
12 actually not unusual. And by our terms, you've only been
13 deliberating a little while, though. It's just very often the
14 case that jurors feel that they can't reach a decision, and
15 then when you have the opportunity to talk a little more and
16 deliberate, it's been my experience that jurors often can
17 reach a decision. And so I am going to ask you to resume your
18 deliberations, but I'm going to ask you to do it tomorrow. I
19 think it might be -- given, you know, it's 15 minutes to 5:00,
20 and so I think it might be a good time to break and get a
21 fresh start tomorrow. And when you resume your deliberations,
22 I'm just going to ask that you continue to listen to one
23 another respectfully, and as I said in my charge, don't
24 hesitate to change your opinion if you're convinced that you
25 were wrong, but on the other hand, you should never surrender

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1 an honestly-held view of the case just because you're outvoted
2 or because it's getting late. And by talking to you now, I
3 don't mean to pressure you or rush you into agreeing on a
4 verdict. I want you to take your time and take the time you
5 need to discuss it. It's important that you each consider the
6 case individually and discuss it amongst yourselves. There's
7 no hurry.

8 So I'm going to excuse you for the evening, and I'll
9 just repeat those instructions that I've given you. Please
10 don't talk about the case at all. Don't look up anything,
11 don't permit anyone to approach you to discuss the case. But
12 have a good night, and we'll get a fresh start tomorrow.
13 Thanks so much.

14 THE JURY: Thanks so much.

15 THE COURT: Oh, 9:30.

16 THE COURTROOM DEPUTY: All rise.

17 (Jury exits the courtroom.)

18 (Time noted: 4:46 p.m.)

19 THE COURTROOM DEPUTY: You may be seated.

20 THE COURT: We do have our poor alternates and I
21 have to excuse them tonight. I think I have to give them the
22 same caution, so I'm going to bring them in too.

23 (Pause in the proceedings.)

24 THE COURTROOM DEPUTY: All rise.

25 (Alternate jurors enters the courtroom.)

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1 (Time noted: 4:50 p.m.)

2 THE COURTROOM DEPUTY: You may be seated.

3 THE COURT: Good afternoon, ladies and gentlemen.

4 We have not forgotten about you. But I excused the regular

5 jurors for the night. We all appreciate your service, and

6 participation in the case. I'm just going to excuse you for

7 the night also and just tell you to continue not to talk about

8 the case or look anything up or permit anyone to speak to you

9 about it. But if you could be back tomorrow at 9:30, I would

10 appreciate it. Thank you so much. We'll see you tomorrow.

11 THE COURTROOM DEPUTY: All rise.

12 (Alternate jurors exit the courtroom.)

13 (Time noted: 4:51 p.m.)

14 THE COURTROOM DEPUTY: You may be seated.

15 THE COURT: All right. Anything before we break for

16 the night?

17 MR. PAULSEN: No, Your Honor.

18 MR. FRISCH: No, thank you.

19 THE COURT: All right. See everybody tomorrow.

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22 (Proceedings adjourned at 4:51 p.m. to resume on

23 March 29, 2023 at 9:30 a.m.)

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